No. 89-1212 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1989

AVON DAVIS, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
SUSAN M. SLEATER
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

13 pp

QUESTION PRESENTED

Whether the Secretary of Health and Human Services should be held in contempt of court for excluding interim Social Security benefits paid to the claimant in calculating the fee of claimant's attorney, when the district court's order pursuant to which the Secretary acted also excluded those interim benefits.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulation: Page

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-1212

AVON DAVIS, PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 15-25) is reported at 894 F.2d 271. The order of the district court (Pet. App. 26) is unreported.

JURISDICTION

The decision of the court of appeals was entered on October 25, 1989. A petition for rehearing was denied on December 12, 1989 (Pet. App. 27). The

petition for a writ of certiorari was filed on January 16, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Title 42, U.S.C., Section 406(b)(1) provides in relevant part:

> Whenever a court renders a judgment favorable to a claimant under this subchapter who was represented before the court by an attorney, the court may determine and allow as part of its judgment a reasonable fee for such representation, not in excess of 25 percent of the total of the past-due benefits to which the claimant is entitled by reason of such judgment, and the Secretary may * * * certify the amount of such fee for payment to such attorney out of, and not in addition to, the amount of such past-due benefits. In case of any such judgment, no other fee may be payable or certified for payment for such representation except as provided in this paragraph.

Title 20, C.F.R., Section 404.1703, defines past-due benefits as:

> [T]he total amount of benefits payable under title II of the Act to all beneficiaries that has accumulated because of a favorable administrative or judicial determination or decision, up to but not including the month the determination or decision is made.

STATEMENT

1. Petitioner brought this action seeking judicial review of a decision of the Secretary of Health and Human Services holding that his disability had ceased and that he was no longer entitled to Social Security disability benefits (Pet. App. 16). While his case was pending in the district court, the Social Security Disability Benefits Reform Act of 1984 (1984 Disability Amendments), Pub. L. No. 98-460, § 2, 98 Stat. 1794-1799 (codified as amended at 42 U.S.C. 423), was enacted. The district court granted the Secretary's motion to remand the case for further administrative review under the new statute (Pet. App. 16).[1]

Upon remand, petitioner elected to receive interim benefits.[2] Following additional development of the record and completion of administrative proceedings on remand, the Secretary held that petitioner's disability benefits should be reinstated (Pet. App. 17). The Secretary calculated that petitioner was entitled to $6,205.20 in past-due benefits as a result of the favorable decision. In accord with his practice at that time, the Secretary did not include petitioner's interim benefits in calculating his past-due benefits for the purpose of computing attorney fees (*ibid.*). Therefore, pursuant to 42 U.S.C. 406, the Secretary withheld $1,551.30 (25% of $6,205.20) for a possible fee award to petitioner's attorney (Pet. App. 17). The remaining $4,653.90 was paid to petitioner.

---

[1] Section 2 of the 1984 Disability Amendments provided a new standard for review of termination of disability benefits.

[2] Section 2(e) of the 1984 Disability Amendments provided that certain previously terminated claimants could elect to receive interim benefits beginning with the month of the election and ending when an initial redetermination was made by the Secretary. 42 U.S.C. 423(g)(1)(C). This statutory payment option was created to maintain the status quo, easing financial and emotional hardships that might otherwise be incurred from the termination of benefits. Petitioner received approximately $15,000 in interim benefits (Pet. App. 17).

2. Petitioner's attorney, Anthony W. Bartels, petitioned the district court for an attorney fee award under 42 U.S.C. 406(b)(1). The district court's order awarding the fee concluded (Pet. App. 17-18):

> it is Ordered and Decreed that an attorney's fee and costs in the amount of $2,171.25 from the past-due benefits due the [petitioner], is hereby allowed to Anthony W. Bartels, the [petitioner's] attorney, pursuant to 42 U.S.C. § 406(b)(1). The [respondent] is hereby ordered to compute, certify and pay said attorney this sum, in addition to any fees found to be due for representation at the administrative level, or twenty-five percent of the [petitioner's] past-due benefits, whichever sum is less.

The order was silent as to whether interim benefits were to be included in this calculation. Approximately two weeks prior to the entry of the order, however, the same district judge had held in two similar cases in which Bartels was also the claimant's attorney that there was "no authority to award attorney's fees from . . . interim benefits." Pet. App. 22 (citing *Gowen* v. *Bowen*, No. J-C-83-386 (E.D. Ark. June 12, 1987), slip op. 2, and *Pittman* v. *Bowen*, No. J-C-84-114 (E.D. Ark. June 9, 1987), slip op. 2). Accordingly, the Secretary in this case adhered to his previous interpretation, which excluded interim benefits from past-due benefits. The Secretary paid Bartels $1,551.30, representing the lesser of $2,171.25 or 25% of petitioner's past-due benefits, excluding the interim payments (Pet. App. 18).

3. Bartels then petitioned the Secretary for attorney fees for services performed in this case at the administrative level. See 42 U.S.C. 406(a). The Secretary, interpreting the court order as imposing a cap of 25% of the past-due benefits on the total amount of the fee award,[3] advised Bartels that no additional fee could be awarded because he had already been paid the full amount available under the district court order for his work in the district court (Pet. App. 31-32).

Bartels informed the Secretary of his view that past-due benefits should include interim benefits, and asked that his administrative fee application be held pending the Eighth Circuit's decision in *Gowen* v. *Bowen* and *Pittman* v. *Bowen*, which raised this issue (Pet. App. 33-35). The Secretary agreed to this request (*id.* at 36-37).

4. The Eighth Circuit reversed the two district court decisions in *Gowen* and *Pittman*, and held that 42 U.S.C. 406(b)(1) includes interim benefits as part of the definition of past-due benefits for the purpose of calculating attorney fees. *Gowen* v. *Bowen*, 855 F.2d 613 (1988); see also *Shoemaker* v. *Bowen*, 853 F.2d 858 (11th Cir. 1988); *Condon* v. *Bowen*, 853 F.2d 66 (2d Cir. 1988); but see *Rodriguez* v. *Secretary of HHS*, 856 F.2d 338 (1st Cir. 1988) (interim benefits *not* included in definition of past-due benefits).

5. The Secretary thereupon reaffirmed his original denial of Bartels' request for an award of fees for his administrative work in this case.[4] There had been

---

[3] The court of appeals eventually agreed with this interpretation of the district court's order (Pet. App. 21).

[4] The district court never issued any order regarding fees at the administrative level. The authority to award fees for administrative level work is committed to the Secretary; his determination in this regard is unreviewable. Pet. App. 19, citing 42 U.S.C. 406(b)(1); *Gowen* v. *Bowen*, 855 F.2d 613,

no appeal challenging the Secretary's interpretation of the court's fee award in this case, nor any attempt to obtain a clarification of the court's order making that award. Nevertheless, more than sixteen months after the entry of that order, Bartels moved to hold the Secretary in contempt for failing to comply with the original fee order. Bartels alleged that the original fee order required use of the rule subsequently articulated in *Gowen*, and thus that the interim benefits should have been included in calculating the sum available to pay his fee. In his motion for contempt, Bartels sought an order requiring that: (1) the remaining $619.95 of the claimed fee for district court work be paid based on interim benefits; (2) the amount remaining from 25% of past-due benefits be used to pay his fee for work in the administrative proceeding; and (3) an attorney fee be awarded for filing the contempt motion. Pet. App. 18-19.

The district court denied Bartels' motion without comment (Pet. App. 26). The Eighth Circuit affirmed, ruling that "the Secretary fully complied with the express terms and intent of the [district court] order" (*id.* at 24). The court of appeals found "it disturbing that Bartels now contends the Secretary 'chose' to disregard 'the specific orders' of the district court" because Bartels "was or should have been fully aware of the district court's intent;" the court further noted that "the contempt motion here approaches the limit of responsible advocacy" (*id.* at 23 n.6).

---

618 (8th Cir. 1988); *Fenix* v. *Finch*, 436 F.2d 831, 838 (8th Cir. 1971).

ARGUMENT

Bartels seeks further review of the denial of his motion to hold the Secretary in contempt, although the court below correctly found the Secretary had fully complied with the district court's order.

1. It is far from clear that there is a proper petitioning party in this case. Bartels, an attorney, identifies Avon Davis as the petitioner, but then asserts that he is himself petitioning for review (Pet. 1) and refers to his relationship with his client Davis in the past tense (Pet. 3). Moreover, because Bartels seeks to compel the Secretary to withhold future benefits due Davis for payment to Bartels, the petition asserts interests that are antithetical to those of Davis.[5] Cf. *United States Dep't of Labor* v. *Triplett*, No. 88-1671 (Mar. 27, 1990), slip op. 5. Indeed, if Davis were to be represented in this case in this Court, he would clearly appear as a respondent, not a petitioner. We are aware of no case that suggests that an attorney is entitled to petition this Court to reopen issues long resolved in the client's favor. Cf. *Diamond* v. *Charles*, 476 U.S. 54, 69-71 (1986). In any event, the issues Bartels presents are so evidently without merit that no further review is appropriate in this case.

2. The Eighth Circuit's decision in *Gowen* did not change the meaning of the order the district court had entered in this case fourteen months earlier. Contempt proceedings "do[] not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed." *Maggio* v. *Zeitz*, 333 U.S. 56,

---

[5] This is not the first time that Bartels has sought to raise interests antithetical to those of the named petitioner, without establishing any present right to represent that petitioner. See *Trekas* v. *Sullivan*, cert. denied, 110 S. Ct. 80 (1989); *Russell* v. *Sullivan*, cert. denied, No. 89-1130 (Mar. 19, 1990).

69 (1948). See *Chicot County Drainage Dist.* v. *Baxter State Bank*, 308 U.S. 371, 374-375 (1940).

Moreover, the meaning of that order at the time it was entered should have been as evident to Bartels as it was to the Secretary. The court of appeals was clearly correct in finding that Bartels "was or should have been fully aware of the district court's intent" that interim benefits be excluded in calculating past-due benefits (Pet. App. 23 n.6). As the court of appeals explained, Bartels was the attorney who received fees in *Pittman* v. *Bowen*, No. J-C-84-114 (E.D. Ark. June 9, 1987), and *Gowen* v. *Bowen*, No. J-C-83-386 (E.D. Ark. June 12, 1987), which were decided by the same district court shortly before the order in the instant case (Pet. App. 22-23). In both *Pittman* and *Gowen* the district court ruled that it had "no authority to award attorney's fees from . . . interim benefits" (*id.* at 22 (quoting *Pittman*, slip op. 2, and *Gowen*, slip op. 2)). The relevant portion of the order in this case was identical to the orders in *Pittman* and *Gowen* (Pet. App. 23). "It is clear, then, that the district court's order was intended to follow the result in these two cases by not awarding attorney's fees out of interim benefits" (*ibid.*).[6]

3. Violation of a court order is a prerequisite for a finding of civil contempt. *Hicks* v. *Feiock*, 485 U.S. 624 (1988); *Young* v. *United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 795-796 (1987); *McComb* v. *Jacksonville Paper Co.*, 336 U.S. 187 (1949). Since "the Secretary fully complied with the express terms and intent of the order" (Pet. App. 24), Bartels' motion for contempt was so patently without merit that the court of appeals correctly concluded

[6] If Bartels wanted to contest the district court's decision, he should have appealed it, as he did the orders in *Pittman* and *Gowen*.

that it "approaches the limit of responsible advocacy" (*id* at 23 n.6).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

ANTHONY J. STEINMEYER
SUSAN M. SLEATER
Attorneys

MARCH 1990

☆ U. S. GOVERNMENT PRINTING OFFICE: 1990 262203 827